Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SALT LAKE COUNTY and MICHAEL GEORGE,
Petitioners,
v.
J. GARY SHEETS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the face of conflicting circuit court standards, what is the appropriate way to determine whether information collected during a criminal investigation (here, brief excerpts from a homicide victim's diary) should be given constitutional protection under the confidentiality branch of the right to privacy?

2. If a constitutionally protected right to privacy in given information has been deduced, which of the several court standards determines when government may disclose that information?

3. May the Court of Appeals invalidate Utah's two-year statute of limitations solely because the statute specifically refers to Section 1983 claims when other states may apply two-year (or even shorter) limitation periods to Section 1983 claims because their statutes do not refer to Section 1983?

STATEMENT PURSUANT TO RULES 14.1(b) AND 29.1

All parties are named in the caption.

Salt Lake County is a body corporate and politic under the laws of the State of Utah. Although the County has a number of related Improvement Districts and Authorities, they are public entities with no private ownership.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTORY PRAYER

Appellants Salt Lake County and Michael George pray this Court to grant their petition for certiorari to review an adverse decision by the United States Court of Appeals for the Tenth Circuit.

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is reported at 45 F.3d 1383 (10th Cir. 1995) (*see* Appendix 1a-14a).

The decision of the United States District Court, District of Utah, is reported at 783 F. Supp. 577 (D.Ut. 1991) (*see* Appendix 15a-24a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 because appellants seek review of an adverse decision rendered by the United States Court of Appeals for the Tenth Circuit.

STATUTORY PROVISIONS INVOLVED

The statutes underlying this case are:

I. 42 U.S.C. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

II. Utah Code Ann. § 78-12-25. Within four years.

> Within four years:
>
> * * *
>
> (3) An action for relief not otherwise provided for by law.

III. Utah Code Ann. § 78-12-28. Within two years.

> Within two years, an action:
>
> (1) against a marshal, sheriff, constable, or other officer upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution;

but this section does not apply to an action for an escape;

(2) for recovery [of] damages for the death of one caused by the wrongful act or neglect of another; or

(3) for injury to the personal rights of another as a civil rights suit under 42 U.S.C. 1983.

STATEMENT OF THE CASE

1. Early on the morning of October 15, 1985, a bomb exploded in Salt Lake City, killing Steve Christensen, a former executive of Coordinated Financial Services ("CFS"). Later that morning, a second bomb killed Kathy Sheets, wife of Appellee J. Gary Sheets, chairman of the board of CFS. App. 2a.

The Salt Lake City Police and the Salt Lake County Sheriff immediately began investigating the bomb scenes and the lives of the victims, seeking leads to the bomber. Other local and federal agencies joined the investigation. Several days after the initial explosions, a third bomb exploded in a car owned by Mark Hoffman, seriously injuring Mr. Hoffman, a dealer in rare documents and a business acquaintance of Mr. Christensen and Mr. Sheets. The car had been parked on a downtown street a few blocks from Mr. Christensen's office. The bombings generated broad media attention and public concern, even some fear.

During the investigation of the deaths, Salt Lake City Detectives Jim Bell and Kenneth Farnsworth made a routine request that Mr. Sheets let them take his late wife's diary. After reading the diary, Mr. Sheets complied with the request, having been told by Detective Farnsworth it would remain confidential. App. 2a. The Salt Lake City Police never marked the diary confidential. Detective Bell provided the diary to the Salt Lake County Attorney's office but never said to keep it confidential. A County employee made three copies (file copy, working copy and defense copy), then returned the original to

Detective Bell who made a copy before returning the diary to Mr. Sheets.

Appellant Michael George, one of Salt Lake County's investigators on the homicides, never was told the diary was promised to be confidential. App. 40a. He read the working copy and *may* have photocopied excerpts or made handwritten excerpts.

In January 1987, Mr. Hoffman pleaded guilty to the two homicides. He also admitted forging several documents that had generated widespread controversy in Utah. Salt Lake County thus closed its investigation.

Salt Lake County keeps all investigative materials confidential during an investigation. After an investigation is closed, County files are archived, making them available for public inspection. App. 3a. Copies of the diary were archived among voluminous other investigative materials. Salt Lake County also permits its investigators to speak to the press after an investigation is closed, so long as all media representatives are accorded equal access. App. 3a.

After the Hoffman plea, Mr. George met with three authors writing books about the bombings. Mr. George did not intentionally make a copy of the diary available to the authors. At most, he allowed one of them, Robert Lindsey, access to a file box that *may* (although he could not remember) have contained photocopies and his own notes about the diary. App. 3a.

2. When his book was published in 1988, Mr. Lindsey quoted brief excerpts from Mrs. Sheets' diary on four separate pages of his book. R. Lindsey, *A Gathering of Saints*, Simon & Schuster, New York: 1988, 356 pp. ("*Gathering*"). Mrs. Sheets had written:

> Scared and uncertain. . . . Will we ever have money again? I'm so scared. I want to escape. . . .

Gathering at 17 (*elipses as published by Lindsey*)

> Gary layed [*sic*] the Co. problems out tonight. Very scary and upsetting. Oh, I pray things turn out

> okay. I am really scared. He always pulls things off; but this is scary.

Gathering at 146

> I hate being so fat!
>
> . . . Gary feeling low again, . . . I worry about him. . . . Gary in much better mood—nothing new in business—he's just more up. Hurrah!!! . . . Gary depressed again.
>
> . . . Tended all kids tonight. They are so darling —but a hand full. Slept in. It was nice. Gary and I had a good talk. Wish we were more companionable—did more together. I feel left alone a lot.

Gathing at 156 (*Lindsey's words omitted*).

> I get sick of church, ... Feel a little better, ... Gary says we will do all we can. *How can this happen to such nice men*? Very depressing.
>
> . . . Gary and I went to a movie. It was fun. He is feeling up and confident. Hope it continues. I really love him and I know he will take care of me. I worked hard today on laundry, etc. . .
>
> My friends had a surprise 50 yrs. birthday party for me. It was hilarious. They all dressed up like old ladies. Jan Forsgren wore knee length garments, had them hanging. . . . Great fun. . . . Lazy day . . . I am very down. House is a mess. I am fat. Business is bad. I am depressed.

Gathering at 180 (*Lindsey's words omitted; emphasis by Lindsey*).

3. On July 31, 1989, Mr. Sheets filed suit against Mr. Lindsey and his publisher because of the publication of the excerpts. App. 16a. On December 4, 1990, Mr. Sheets amended his complaint to add a claim under 42 U.S.C. § 1983 against Salt Lake County, Mr. George and the then County Attorney. App. 3a-4a, 16a. Mr. Sheets claimed he had a reasonable expectation his wife's writings would remain confidential and that publication

of the excerpts embarrassed him, violating his constitutional right of privacy and taking his property.

The County defendants moved to dismiss on statute of limitations grounds because Mr. Sheets had failed to assert his purported Section 1983 claim within the two-year period allowed by Utah law. Utah Code Ann. § 78-12-28(3). The district court denied the motion, finding Utah's specific statute of limitations governing Section 1983 claims was "neither consistent with, nor analogous to, federal law and policy." App. 22a. The district court opined Utah's residual four-year statute of limitations, Utah Code Ann. § 78-12-25(3), was "the most analogous statute of limitations with respect to § 1983." App. 23a; *see* 42 U.S.C. § 1988. Accordingly, the district court ruled the claim timely and allowed the Section 1983 claim to be tried to the jury.

After the close of Mr. Sheets' case and again after trial, the County and Mr. George moved for judgment as a matter of law under Fed. R. Civ. P. 50(1), arguing that publication of the excerpts did not rise to a violation of constitutional privacy. The district court dismissed the claim against the County Attorney but denied the rest of the motions, and concluded that under applicable Tenth Circuit law, Mr. Sheets had a constitutional privacy right if he had any reasonable expectation of confidentiality in the material. App. 39a-40a; *see also* App. 27a-40a.

Although Mr. Sheets could testify only to his personal expectations of privacy, the jury returned a verdict of $650,000 against Salt Lake County and Mr. George. App. 4a. The District Court denied post-trial motions for judgment as a matter of law, for a new trial and for remittitur, then awarded an attorney's fee of $77,896.93 against Salt Lake County and Mr. George under 42 U.S.C. § 1988(b). App. 25a-26a.

The Tenth Circuit affirmed, following its earlier holding that, in enacting U.C.A. § 78-12-28(3), "the Utah legislature exceeded its authority," thus finding Utah's

specific two-year limitation on Section 1983 claims "invalid." App. 4a, *see Arnold v. Duchesne County*, 26 F.3d 982 (10th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 721 (1995). Like the district court, the Tenth Circuit determined that Utah's residual four-year statute of limitations, Utah Code Ann. § 78-12-25 (3), applied. App. 5a.

The Tenth Circuit next found a constitutionally-rooted claim for privacy arises whenever an individual "claims an interest in avoiding disclosure of things personal to him," App. 6a, explaining that "Mrs. Sheets' diary entries about her husband and their marital relationship are certainly as personal as medical and certain financial records, which courts have placed within the ambit of constitutional protection." App. 7a-8a, *citations omitted*. Unless the County could show a "compelling state interest" in disclosing the information, a compensable Section 1983 claim exists. App. 6a, 8a. The court found no such County interest. App. 8a.

5. Salt Lake County and Mr. George received an extension of time to file their petition for certiorari to and including June 9, 1995, by order of Honorable Stephen Breyer dated March 22, 1995.

REASONS FOR GRANTING THE PETITION

I. THE DECISIONS OF THE COURTS OF APPEALS ARE IN DIRECT CONFLICT AS TO THE APPLICABLE STANDARDS IN THE RECOGNITION AND ANALYSIS OF FEDERAL CONSTITUTIONAL PRIVACY RIGHTS.

Although apparently recognizing that some expectation of confidentiality might be so weighty as to invoke constitutional protection, this Court has never given constitutional protection to any claim of privacy under Section 1983 for disclosure of allegedly confidential information.

Eighteen years ago, in a trilogy of cases decided in the 1975 and 1976 Terms, the Court provided scant analysis to determine when, if ever, an individual's claim to a general expectation of confidentiality may rise to a level of constitutional protection under a right of privacy. *Nixon v. Administrator of General Services*, 433 U.S. 425, 465 (1977); *Whalen v. Roe*, 429 U.S. 589 at 602-03 (1977); *Paul v. Davis*, 424 U.S. 693, 712-14 (1976).[1] In *Whalen*, this Court stated:

> The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions. 429 U.S. at 599-600, *footnotes omitted.*

Those three cases are significant in constitutional history because they discussed a branch of the privacy right

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[1] In *Nixon*, this Court held the Presidential Recordings and Materials Preservation Act did not impermissibly infringe the former President's privacy interests. 433 U.S. at 455-65. In *Whalen*, this Court found that a New York program identifying and categorizing patients who received Schedule II drugs did not, on its face, violate constitutional privacy rights. 429 U.S. at 603. In *Paul*, this Court found an "Active Shoplifters" flier distributed by local police chiefs in Kentucky did not violate plaintiff's procedural due process rights. 424 U.S. at 713-14.

not since refined by this Court: an individual's purported constitutional right to protect confidential information against disclosure to, or dissemination by, a governmental agency.[2] The Court did not decide what factors must be present to support a constitutional claim for breach of confidentiality. Indeed, the *Whalen* Court left the issue open for future consideration, concluding:

> We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional . . . . 429 U.S. at 605-06.[3]

The difficult and complicated issues left open by the *Whalen* Court have moved through the courts of appeals for almost two decades—with a predictable result. The only real agreement among the Circuits is that "the contours of the confidentiality branch" of privacy are "murky."[4] The Circuits are in direct and acknowledged

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[2] Although only *Paul* was a Section 1983 case, the three cases are the seminal cases considering a constitutional right of privacy in confidential information, a right that may give rise to Section 1983 claims as well as other confidentiality issues with possible constitutional dimension.

[3] In attempting to determine why the *Whalen* Court left open the question when, if ever, an individual's expectation of confidentiality rises to the level of a protectable constitutional right, one need look no further than the concurring opinions in *Whalen* itself. Two respected members of the Court disagreed squarely on the confidentiality claim and whether, on the facts of the case, such a claim could ever lead to a cognizable constitutional claim. *Compare e.g., Whalen*, 429 U.S. at 606 (Brennan, J., concurring) (broad dissemination of the collected data by state officials *would clearly* implicate protected privacy rights), *with* 429 U.S. at 608-09 (Stewart, J., concurring) (broad dissemination of collected data *would not* clearly implicate protected privacy rights), *emphasis added.*

[4] *See Scheetz v. The Morning Call Inc.*, 946 F.2d 202, 206 (3rd Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) ("Although cases exploring the autonomy branch of the right of privacy are legion, the contours of the confidentiality branch are murky.")

conflict over both the legal standard for determining whether a constitutional right to confidentiality exists in given circumstances, and, if it does, what standards govern how the right should be treated in the face of competing governmental interests favoring disclosure.[5] Perhaps in no other area of constitutional law have so many courts of appeals gone on record in describing an area as unsettled and requesting, expressly or implicitly, direction from this Court about evaluating claims of privacy.[6]

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[5] *See* discussion at pp. 14-18, *infra*.

[6] FIRST CIRCUIT: *Borucki v. Ryan*, 827 F.2d 836, 841 (1st Cir. 1987) ("*Whalen* provides little guidance regarding the nature of the confidentiality branch of the right of privacy"); *see also Frazier v. Bailey*, 957 F.2d 920, 931 (1st Cir. 1992), (constitutional right to "familial privacy" has inexact dimensions); SECOND CIRCUIT: *Igneri v. Moore*, 898 F.2d 870, 873 (2d Cir. 1990) (right of privacy "difficult to articulate precisely); *Barry v. City of New York*, 712 F.2d 1554, 1558 (2d Cir. 1984), *cert. denied*, 464 U.S. 1017 (1983) ("exact nature and scope of the right to privacy has never been fully defined"); but see *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (constitutional right of privacy for individual's HIV status is an extension of "a recognized constitutional right to privacy in personal information"); THIRD CIRCUIT: *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 206 (3d Cir. 1991) (contours "murky") (*as quoted in text*); FOURTH CIRCUIT: *Hodge v. Jones*, 31 F.3d 157, 164 (4th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 518 (1994) ("There is little, if any, clear guidance in the relevant caselaw that would permit us to chart with certainty the amorphous boundaries between the Scylla of familial privacy and the Charybdis of legitimate governmental interests"); FIFTH CIRCUIT: *National Treasury Emp. Union v. Dept. of Treasury*, 25 F.3d 237, 242 (5th Cir. 1994) (constitutional right to privacy "remains largely undefined"); *Plante v. Gonzalez*, 575 F.2d 1119, 1127 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979) ("Yet, the concept of a constitutional right of privacy still remains largely undefined" [brackets and quotation omitted]); SIXTH CIRCUIT: *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 340 (6th Cir. 1990) ("The proscription of disclosure encompassed by the right to privacy remains, to this day, relatively amorphous"); SEVENTH CIRCUIT: *Shields v. Burge*, 874 F.2d 1201, 1210 (7th Cir. 1989) ("The Supreme Court has never fully defined the privacy right's exact nature and scope"); NINTH CIRCUIT: *Davis v. Bucher*, 853

The questions resonating throughout the Circuits are well exemplified by the District of Columbia Circuit's recent decision in *National Federation of Federal Employees v. Greenberg*, 983 F.2d 286 (D.C. Cir. 1993). After reviewing *Whalen* and analyzing the purported right to confidentiality, the court expressed in no uncertain terms the deficiency in the guidelines and standards applicable to this area of constitutional law:

> When we return to *Whalen* and look behind the Supreme Court's general remark[s], . . . we find ambiguity. What "individual interests" receive protection from disclosure? Plaintiffs suggest the interest in avoiding humiliation or embarrassment entailed in the disclosure of personal information. What "personal information" and disclosure to whom? To the government as employer or to the world? However one defines the scope of the protection, what are the provisions in the Constitution that are said to confer it? . . . And what of the government's interests in carrying out its constitutional responsibilities? *Id.* at 293.

This case presents an excellent opportunity for this Court to map the "uncharted terrain" of a purported right to confidentiality. *Greenberg*, 983 F.2d at 293. As shown by *Sheets* (App. 1a-14a), the Tenth Circuit permits a jury to find a constitutional right based almost entirely on subjective testimony from a plaintiff; if a court is willing to let a jury define a constitutional right with little to guide it but a plaintiff's personal expecta-

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F.2d 718, 719 (9th Cir. 1988) ("Though often noted, this interest has been infrequently examined; as a result its contours remain less than clear"); ELEVENTH CIRCUIT: *James v. City of Douglas*, 941 F.2d 1539, 1543 (11th Cir. 1991) ("the constitutional right to privacy has vague contours and has been in a state of flux in recent years"); D.C. CIRCUIT: *National Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 293 (D.C. Cir. 1993) (*quoted in text*). The Eighth and Tenth Circuits are the only Circuits either not troubled by the contours of a right to privacy or the only Circuits that have chosen not to comment.

tion, the contours will surely remain murky and unpredictable.

Addressing these issues will resolve at least two direct conflicts among the Circuits: how to define a constitutionally protected right to confidentiality and, once present, how to treat the privacy right against competing governmental interests affecting disclosures. The *Greenberg* questions apply to this case. Certiorari is merited.

A. A Direct Conflict Exists Between the Tenth Circuit's Recognition of a Constitutional Confidentiality Right in This Case and Decisions of Other Circuit Courts Refusing to Recognize or Limiting Such a Right.

This Court commented that former President Nixon had a "legitimate expectation" to prevent disclosure of purely personal documents. *Nixon, supra*, at 458. Some circuits have since made the *Nixon* phrase "legitimate expectation" of privacy into a subjective, unstructured "reasonable expectation of privacy" with varied application and content. *See, e.g.*, App. 6a, 7a ("legitimate" apparently interchangeable with "reasonable.") In circumstances wholly unlike those in *Nixon*, courts of appeals treat the revamped phrase as a constitutional test for privacy, making plaintiffs' assertions of their own personal expectations of privacy equivalent to a constitutional right. In some courts, the right is becoming entirely subjective, lacking in objective definition or limitation.

At the extreme, the Tenth Circuit has recognized, for example, a constitutional right of freedom from embarrassment arising from another person's seemingly innocuous writings.[7] *Sheets*, App. 7a. Compare *Mangels v.*

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[7] The Tenth Circuit did consider common law tort for guidance. App. 7a. This Court refuses to interpret constitutional provisions to impose federal duties analogous to those traditionally imposed by state tort law. *Collins v. City of Harker Heights*, 503 U.S. 115, 127 (1992) (Due Process clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society . . . we

Pena, 789 F.2d 836, 839 (10th Cir. 1986) ("due process . . . implies an assurance of confidentiality with respect to *certain* forms [but what forms?] of personal information possessed by the state"), *emphasis added.* In the Tenth Circuit, jurors are free to award damages to anyone claiming to have a personal expectation that some information is confidential. App. 6a. Compare *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986), for example: the court was objective, finding disclosure of plaintiff's gender and religion to be only a "slight" intrusion into privacy, not worthy of constitutional protection.

THE CONFLICTS. The most explicit conflicts with the Tenth Circuit's subjective standard for constitutional privacy protection are in the Sixth and Eighth Circuits. The Sixth Circuit bluntly concludes "the Constitution does not encompass a general right to nondisclosure of private information." *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994), *citing J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981).

The Eighth Circuit puts the burden on a plaintiff claiming constitutional violation to show the egregious nature of a disclosure before it considers finding a constitutional dimension to the claim of privacy. *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993).

In the Sixth and Eighth Circuits (and probably in the Fifth Circuit as well), Mr. Sheets would have had no

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have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law . . ."), *citations omitted.* While disclaiming that the Restatement (2d) of Torts defines the implied constitutional right of privacy (App. 7a), the Tenth Circuit nonetheless seems to extend constitutional protection to an alleged breach of privacy that the treatise would not recognize in common law tort. Here, the Tenth Circuit has permitted loose, subjective proof of an individual's expectation to lead its analysis of constitutionally protected rights far away from the teachings of this Court.

constitutionally protected privacy right in the information disclosed. Trial courts in the Sixth and Eighth Circuits would have dismissed his Section 1983 claims on a Rule 12b(6) motion.

When courts of appeals routinely refer to a constitutional right of confidentiality as "unsettled" or "undefined" and when they then impose conflicting standards to map uncharted rights, this Court needs to grant certiorari to resolve the conflicts.

B. Even if a Constitutional Confidentiality Right Has Been Recognized, the Circuits Are in Deep Conflict About the Way to Treat the Right in the Face of Competing Governmental Interests.

In *Nixon, supra,* 433 U.S. 425, 456-57, the majority agreed with the lower court's finding of a reasonable balance between the government's overriding interest in preserving Presidential materials and segregating purely personal documents. However, this Court did not explain how to treat future claims of privacy interests and government interests.

The First Circuit has commented that although "balancing of competing interests" might be required when interests in personal privacy and governmental need are at issue, the cases "provide little guidance as to how such interests would be balanced." *Borucki v. Ryan,* 827 F.2d 836, 849 (1st Cir. 1987). *See Pesce v. J. Sterling Morton High Sch. Dist. 201,* 830 F.2d 789, 797 (7th Cir. 1987) (constitutional right to confidentiality does not protect against any and every compelled disclosure; standard of review governing claim of abridgment of right to confidentiality may not be settled).

Because the Sixth Circuit focuses primarily on the limited extent of a right of privacy, it avoids balancing government action against claimed rights of privacy. *J.P. v. DeSanti,* 653 F.2d 1080, 1091 (6th Cir. 1981). The Sixth Circuit may stand alone in its perception of privacy rights and governmental disclosure.

In the absence of standards from this Court, some Circuits have ventured upon the "delicate task of weighing competing interests," *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980), adopting sharply different, conflicting standards to apply once a particular claim to a right of privacy has been acknowledged. With the many conflicts between Circuits and even uncertainties within a Circuit, orderly classification of all Circuit tests is virtually impossible. Nonetheless, cases can be partially grouped into what may be useful and illustrative categories.

BURDEN ON PLAINTIFF. The Eighth Circuit clearly stands alone in its balancing test. It recently put the burden on plaintiff to show that a disclosure would be "shocking" or "egregious" enough to defeat a specific state interest: "to violate [Plaintiff]'s constitutional right of privacy the information disclosed must be either a *shocking* degradation or an *egregious* humiliation of her to further some specific state interest, or a *flagrant* bre[a]ch of a pledge of confidentiality which was instrumental in obtaining the personal information." *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993), *emphasis added*. The Eighth Circuit's objective test is diametrically opposite to the Tenth Circuit in *Sheets*.

"COMPELLING" STATE INTEREST. The Tenth Circuit imposes a burden on government to demonstrate a "compelling" interest in disclosing information. *Denver Policemen's Protective Assoc. v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981); *see also Nilson v. Layton City*, 45 F.3d 369, 371 (10th Cir. 1995).

Only the Ninth Circuit might agree with the result in this case because the Ninth Circuit has also applied a "compelling state interest" test to determine what disclosures of confidential information can be permitted. *Grummett v. Rushen*, 779 F.2d 491, 494 (9th Cir. 1985) (compelling state interest in prison security de-

feats male prisoners' challenge to female guards viewing them nude).

"SUBSTANTIAL" AND "STRONG" STATE INTERESTS. The Second and Third Circuits reject the "compelling" standard appied by the Ninth and Tenth Circuits but look for "substantial" or "strong" state interests.

The Second Circuit applies an intermediate scrutiny or balancing analysis in reviewing confidentiality claims. *Doe v. City of New York*, 15 F.3d 264, 269 (2d Cir. 1994) (City must show "substantial" interest in disseminating HIV information; "some form of balancing approach [is the] appropriate . . . standard of review"); *Bertoldi v. Wachtler*, 952 F.2d 656 (2d Cir. 1991); *Igneri v. Moore*, 898 F.2d 870, 873 (2d Cir. 1990); *Eisenbud v. Suffolk County*, 841 F.2d 42 (2d Cir. 1988); *Barry v. City of New York*, 712 F.2d 1554 (2d Cir.), *cert. denied*, 464 U.S. 1017 (1983); *but see Schacter v. Whalen*, F.2d 35, 37 (2d Cir. 1978) ("crucial" public interest in obtaining information about alleged misconduct by licensed physician recognized without examining whether physician had any expectation of privacy).

The Third Circuit found a "strong public interest" when balancing a city's right to elicit information from police officers being considered for special investigative units. *Fraternal Order of Police Lodge 5 v. Philadelphia*, 812 F.2d 105, 116, 117 (3d Cir. 1987) "[T]he *strong public interest* in avoiding corruption among officers . . . outweighs police officers' limited privacy expectations" regarding personal finances, information, conduct and arrest records. (*Emphasis added.*)

"LEGITIMATE" STATE INTEREST. The Fourth, Fifth and Eleventh Circuits consider whether the state has a "legitimate" interest to test when the state may disclose personal information.

The Fourth Circuit recently permitted a "*legitimate* state interest" in preventing child abuse to supersede

family members' interest in expunging their names from the state registry of child abuse investigations even when no evidence of abuse by the family had been uncovered. *Hodge v. Jones*, 31 F.3d 157, 164, 167 (4th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 518 (1994).

The Fifth Circuit generally considers "legitimate" state interest. *See Cinel v. Connick*, 15 F.3d 1338 (5th Cir.), *cert. denied*, 115 S.Ct. 189 (1994) (discussing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981), and commenting privacy not violated "if a *legitimate state interest* outweighs the plaintiff's privacy interest"). The Fifth Circuit rejected a compelling state interest test then adopted a balancing standard with "something approaching equal protection 'strict scrutiny' analysis . . ." after considering "important [state] interests," in requiring state senate candidates to disclose their financial interests. *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979). The disclosure requirements "severely limited" candidates' and elected senators' privacy. *See also, Woodland v. City of Houston*, 490 F.2d 134 (5th Cir. 1991); *Duplantier v. United States*, 606 F.2d 654, 670 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981).

The Eleventh Circuit has held that a state official may not disclose intimate personal information obtained under pledge of confidentiality absent a government showing that the "legitimate" interests of the state outweigh a threat to an individual privacy interest. *James v. City of Douglas*, 941 F.2d 1539, 1544 (11th Cir. 1991).

FLEXIBLE STANDARD. The D.C. Circuit once advocated a "flexible" standard to assess disclosure of confidential information. *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010 (1984). If the intrusion were "severe," the state would have to demonstrate a "compelling" interest to justify intrusion. *Id.* at 1023 (*citing Whalen, supra*, 429 U.S. at 606, 97 S.Ct. at 880 (Brennan, J. concurring)). The *Tavoulareas* decision

was subsequently vacated and remanded for reconsideration. *Tavoulareas v. Washintgon Post Co.*, 737 F.2d 1170 (D.C.Cir. 1984) (*en banc*). The D.C. Circuit has not established a new test. *See, e.g., Greenberg, supra*, 983 F.2d at 293 ("*Tavoulareas* has no precedential value. . . . Much to our relief, this case does not require any extended survey of this uncharted terrain.")

THE LAW AMONG THE CIRCUITS. These cases show the absence of a consistent, analytic framework for determining when government may disclose private information. Because the issue remains open, the Tenth Circuit has stretched the scope of privacy, virtually obliterating any objectivity in determining what kinds of information should be given constitutional protection against disclosure. The Tenth Circuit transformed Mr. Sheets' expectation into a constitutionally protected right not to be embarrassed.

The *Sheets* case sharply focuses the open issues from the *Whalen* trilogy; now is the ideal and compelling time to return to the confidentiality branch of the right of privacy to resolve almost two decades of uncharted and unguided conflicts among the courts of appeals over the scope of confidentiality and how to evaluate competing private and public interests in the disclosure of material that has been found to be confidential.

II. CONFLICTS AMONG THE COURTS OF APPEALS ABOUT STATE POWERS TO ADOPT STATUTES OF LIMITATION FOR SECTION 1983 CLAIMS CREATE ANOMALOUS RESULTS.

The Tenth Circuit's decision to invalidate Utah's two-year statute of limitations for Section 1983 claims directly conflicts with decisions rendered by other Circuits that permit the states to adopt statutes specifically addressing Section 1983. *Nored v. Blehm*, 743 F.2d 1386, 1387 (9th Cir. 1984); see also *Burnett v. Grattan*, 468 U.S.

42, 53 n.15 (1984).[8] The Tenth Circuit has acknowledged the conflict. *Arnold v. Duchesne County*, 26 F.3d 982, 987 (10th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 721 (1995).

The Tenth Circuit reached its conclusion after reviewing this Court's decisions in *Owens v. Okure*, 488 U.S. 235 (1988); *Wilson v. Garcia*, 471 U.S. 261 (1985), and other decisions about borrowing from state limitations statutes. The Tenth Circuit concluded that *Wilson* did not eliminate confusion about the appropriate limitations period for Section 1983 cases, but *Owens* would implicitly endorse using Utah's residual (four-year) limitations statute. *Id.* at 984-85, 989.

The conflict about state enactments arises because the Tenth Circuit did not find Utah's two-year limitations statute (Utah Code Ann. § 78-12-28(3)) to be analogous to the federal right. The Tenth Circuit found the residual limitation in Utah Code Ann. § 78-12-25(3) more analogous to Section 1983 claims and their scope. *See Arnold, supra*, 26 F.3d 982. The Tenth Circuit concluded the Utah legislature exceeded its power by specifying Section 1983 in its limitations statute, even though the state statute imposes the identical two-year limitation period on other claims against state and local officials. App. 4a, Utah Code Ann. § 78-12-28 (two-year period applies to claims against state and local officials in their actions against individuals (subpart 1) as well as for claims under Section 1983 against state and local officials (subpart (3)).[9]

Other Circuits, by contrast, have approved other states' limitations statutes applying two-year periods to Section

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[8] Oregon subsequently revised its limitations statutes, and other states have repealed or amended limitations statutes specifically citing Section 1983.

[9] The section also imposes a two-year limit on wrongful death claims (subpart 2)).

1983 claims when those statutes are residual, not statute-specific provisions. *Dueks v. Smitherman*, 32 F.3d 535, 537 (11th Cir. 1994) (Alabama's two-year statute of limitations governs 1983 actions); *Gartrell v. Gaylor*, 981 F.2d 254, 256-57 (5th Cir. 1993) (Section 1983 claims in Texas must be brought within two years); *Callwood v. Questel*, 883 F.2d 272 (3d Cir. 1989) (Section 1983 analsyis used to apply Virgin Island's two-year limitation to injury to personal rights); *Jackson v. Nicoletti*, 875 F. Supp. 1107, 1108-09 (E.D.Pa. 1994) (*citing Bougher v. University of Pittsburgh*, 882 F.2d 74, 78 [3d Cir. 1989], court applied Pennsylvania two-year limitations statute to Section 1983 claims).[10]

Some Circuits have upheld an even shorter residual period of limitations (when it is residual) as applicable to Section 1983 claims. *Ford v. Hill*, 874 F. Supp. 149, 151 (E.D. Ky. 1995) (Kentucky's one-year tort limitation governs Section 1983 claims); *see also Muniz-Cabreror v. Ruiz*, 23 F.3d 607, 610 (1st Cir. 1994)

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[10] In addition to those states discussed in the text, the following states have two-year residual statutes of limitation: Alaska: Code Section 09.10.070; Arizona: *Dunlap v. City of Phoenix*, 817 P.2d 8, 13 (Az. App. 1990); Colorado; *Blake v. Dickason*, 997 F.2d 749 (10th Cir. 1993); Delaware: *Pagano v. Hadley*, 553 F.Supp. 171 (D.Del. 1982); Georgia: *Day v. Brown*, 427 S.E.2d 104, 105 (Ga. App. 1993); Hawaii: *Pele Defense Fund v. Paty*, 837 P.2d 1247 (Hi. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 1227 (1993); Idaho: *Mason v. Tucker & Associates*, 871 P.2d 846, 853 (Idaho App. 1994); Illinois: *Palmer v. Bd. of Educ. Comm. Unit. School Dist.*, 46 F.3d 682 (7th Cir. 1995); Indiana: *Loy v. Clamme*, 804 F.2d 405 (7th Cir. 1986); Iowa: *Dautremont v. Broadlawns Hosp.*, 827 F.2d 291 (8th Cir. 1987); New Jersey: *Cito v. Bridgewater*, 892 F.2d 23, 25 (3rd Cir. 1989); Nevada: *Perez v. Seevers*, 869 F.2d 425 (9th Cir.), *cert. denied*, 493 U.S. 860 (1989); Ohio: *Francis v. Cleveland*, 605 N.E.2d 966 (Ohio App. 1992); Oklahoma: *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1988); Virginia (formerly had one-year limitation): *Eldridge v. Bouchard*, 620 F.Supp. 678, 682-83 (W.D.Va. 1985); West Virginia: *McCausland v. Mason City Bd. of Educ.*, 649 F.2d 278 (4th Cir.), *cert. denied*, 454 U.S. 1098 (1981).

(Circuit recognized Puerto Rico has a one-year limitation period applicable to Section 1983 claims).[11]

By holding Utah's four-year residual limitations statute is analogous to Section 1983, the Tenth Circuit has created an anomaly. No logic justifies the holding that Utah's specific two-year statute derogates a Section 1983 claim and exceeds state power when many states have two-year residual limitations periods that apply to Section 1983. The Tenth Circuit itself has approved two-year limitations to Section 1983 claims for the simple reason the two-year period was residual. The difference between "residual" and "specific" vanishes, even in the Tenth Circuit. *Blake v. Dickason*, 997 F.2d 749 (10th Cir. 1993) (Colorado); *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1988) (Oklahoma).

The anomalous conflict is a real, but unnecessary, intrusion into the states' internal management and into their power. This Court can easily end the conflict by granting certiorari to review this issue.

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[11] Besides those states or territories noted in the text, the following have one-year residual limitation periods: California: *Ponderosa Homes, Inc. v. City of San Ramon*, 29 Cal.Rptr. 2d 26, 31 (Cal. App. 1 Dist. 1994); Louisiana: *Detro v. Roemer*, 739 F.Supp. 303 (E.D.La. 1990), *affirmed*, 932 F.2d 966 (5th Cir. 1991); *cert. denied by* 502 U.S. 910 (1991); Tennessee: *Holmes v. Donovan*, 984 F.2d 732, 738 (8th Cir. 1993).

CONCLUSION

For the foregoing reasons, Appellants Salt Lake County and Michael George respectfully request this Court to grant their petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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